IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 62112-2-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
BENNETT BARNES,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: August 24, 2009
	)	

Ellington, J. — Where the State charges multiple counts of the same crime within the same charging period, the court must instruct the jury that a separate and distinct act must support each conviction. Because no such instruction was given in this case, three of Barnes' four convictions must be vacated.

BACKGROUND

Bennet Barnes and Yvonne Fox-Sallah began dating in February 2007, when Fox-Sallah's daughter F.F. was 13 years old. In June of that year, Barnes, Fox-Sallah, F.F. and others moved from Tacoma to a house in Seattle.

F.F. testified she and Barnes began to spend a lot of time together when they moved to Seattle. Barnes frequently provided F.F. marijuana and alcohol, which they consumed together while they drove around Seattle. On five occasions, Barnes and

F.F. used cocaine as well. F.F. said Barnes provided her with alcohol, marijuana, and money whenever she asked.

F.F.'s friends sometimes joined Barnes and F.F. when they drove around, usually only one friend at a time. C.R., then 14 years old, testified that she, Barnes, and F.F. drank alcohol and smoked marijuana three or four times. C.R.'s younger sister, A.R., testified that she smoked marijuana with Barnes and F.F. once. A.R. and F.F. both testified that on that occasion, Barnes laced the "blunt" with cocaine.

F.F. also testified about sexual abuse. She said Barnes began touching her after they moved to Seattle, and eventually the two began having sex. F.F. testified this happened frequently while she was drunk or high. F.F. told her mother about the abuse in November 2007. Fox-Sallah reported the disclosure to the police the following day. Soon after, F.F. and Fox-Sallah moved to California.

The State initially charged Barnes with two identical counts of rape of a child in the second degree, listing F.F. as the victim (counts I and II), and two counts of violation of the uniform controlled substances act (VUCSA), delivery of controlled substances to a minor (counts III and IV). The two VUCSA counts were distinguished on the basis of the drug delivered (cocaine, ecstasy and marijuana and cocaine and marijuana, respectively), and one included a sexual motivation allegation. Prior to trial, the State amended the information to add two more VUCSA charges for delivery of cocaine and marijuana (counts V and VI), identical except that one included a sexual motivation allegation. All counts contained the same charging period of June 1, 2006 through November 1, 2007.

During the jury trial, the court granted the State's motion to amend the information to conform to the evidence presented at trial. Since F.F. had testified that the sexual abuse did not begin until after they moved to Seattle, the second amended information narrowed the charging dates on the two counts of rape and the two VUCSA counts that alleged sexual motivation (counts III and V) to June 1, 2007 through November 1, 2007. These VUCSA counts were also amended to identify the drugs delivered (cocaine and marijuana, respectively). The other two VUCSA charges (counts IV and VI) retained the original charging period, but were amended to identify the drugs delivered (cocaine and marijuana, respectively).

During closing argument, the prosecutor used a chart to illustrate which of the VUCSA charges pertained to F.F., C.R., and A.R. She told the jury that counts I and II (rape of a child) and counts III and V (VUCSA/delivery with sexual motivation) pertained to F.F. Count III related to cocaine and Count V to marijuana. Count IV pertained to A.R. and cocaine, and Count VI to C.R. and marijuana.

During the break after her argument, the prosecutor asked the court to add language to the to convict instructions for the two child rape charges.[1] The proposed language instructed the jury that for each count of child rape, it must find an act of sexual intercourse "separate and distinct" from the act alleged in the other count. The court asked whether similar language was needed for the VUCSA charges, but the prosecutor believed the language was unnecessary because she had elected specific

[1] The prosecutor noted the need for such language in light of this court's decision in State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007) (incorrectly transcribed in the record as the "Warshine" case).

and different acts to support each of those charges.

The jury found Barnes not guilty of the rape charges, but guilty of all four VUCSA charges. Barnes appeals.

DISCUSSION

Double Jeopardy

Barnes first contends the failure to include the "separate and distinct" language in the to convict instructions on the VUCSA counts exposed him to double jeopardy. We review challenges to jury instructions de novo, within the context of the instructions as a whole.[2]

"The right to be free from double jeopardy . . . is the constitutional guarantee protecting a defendant against multiple punishments for the same offense."[3] Because jury instructions "'must make the relevant legal standard manifestly apparent to the average juror,'"[4] the right to be free from double jeopardy is violated when "it is not manifestly apparent to the jury that the State is not seeking to impose multiple punishments for the same offense."[5]

In State v. Borsheim[6] and State v. Berg,[7] we held that where the State charges multiple counts of the same crime within the same charging period, the failure to

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[2] State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2008).

[3] State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (citing U.S. Const. amend. V; Wash. Const. art. I, § 9).

[4] Id. (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)).

[5] Berg, 147 Wn. App. at 931 (citing Borsheim, 140 Wn. App. at 367).

[6] 140 Wn. App. 357, 366, 165 P.3d 417 (2007).

[7] 147 Wn. App. 923, 931, 198 P.3d 529 (2008).

instruct the jury that each conviction must be based upon a separate and distinct act allowed the jury to unanimously find that only one act had been proven beyond a reasonable doubt and to base multiple convictions on that single act, in violation of the prohibition against double jeopardy.[8]

Here, Barnes was charged with four counts of delivery of a controlled substance to a minor. One pair of counts alleged a broad charging period. The other pair alleged a narrower period fully encompassed by the broader period. The court's instructions, which were virtually identical to those given in Berg, omitted the requirement that the jury base each conviction upon a separate and distinct act.[9]

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[8] Id. at 931–35; Borsheim, 140 Wn. App. at 366–70.

[9] The relevant jury instructions are as follows:

> No. 6. A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.
>
> . . . .
>
> No. 18. The State alleges that the defendant committed acts of Violation of the Uniform Controlled Substances Act— Delivery of a Controlled Substance to a Person Under 18 years of age, on multiple occasions. To convict the defendant on any count of Violation of the Uniform Controlled Substances Act— Delivery of a Controlled Substance to a Person Under 18 years of age, one particular act of Violation of the Uniform Controlled Substances Act—Delivery of a Controlled Substance to a Person Under 18 years of age must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Violation of the Uniform Controlled Substances Act— Delivery of a Controlled Substance to a Person Under 18 years of age.
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> Instruction 19. To convict the defendant of the crime of Violation of the Uniform Controlled Substances Act—Delivery of a Controlled Substance to a Person Under 18, as charged in count III, each of the following elements of the crime must be proved beyond a reasonable

The State does not argue that the instructions in this case can be distinguished from those held inadequate in Borsheim and Berg. Rather, the State contends that in Barnes' case, the charging documents, evidence, instructions, and closing argument made manifestly clear that the State did not seek to impose multiple punishments for the same offense. We disagree.

The State points out that the second amended information distinguished between the charges based upon the type of drug delivered, and that two of the counts correlated with the rape charges, which specified F.F. as the victim, by using the same, narrower charging period and including sexual motivation allegations. But it is nowhere evident that the jury knew the contents of the information.

Second, while the evidence certainly allowed the jury to find separate and distinct acts upon which to base the four convictions, nothing compelled such a

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doubt:

> (1) That during a period of time intervening between June 1, 2007 through November 1, 2007, the defendant delivered a controlled substance to another person who was under 18 years of age;
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> (2) That the defendant was over 18 years of age;
>
> (3) That the defendant knew that the substance delivered was a controlled substance; and
>
> (4) That the acts occurred in the [s]tate of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count III.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count III.

Clerk's Papers at 31, 43, 44.

finding. Presented with four virtually identical to convict statements and no instruction requiring a separate and distinct act for each count, the jury could have convicted Barnes on all four counts based upon a single act.

The State argues that the unanimity instructions given by the court in this case effectively protected against that result. The jury was instructed that a separate crime was charged in each count and that the jury must unanimously agree as to which act of delivery to a minor was proved in order to convict "on any count."[10] But these instructions were identical in all relevant respects to the unanimity instructions given in Berg, which we held inadequate to protect against double jeopardy.[11]

Finally, we have already held that the State cannot cure through argument a double jeopardy violation that arises from defective jury instructions.[12] In State v. Kier,[13] the State had charged the defendant with both first degree robbery and second degree assault arising from the same carjacking incident wherein the defendant pointed a gun at both the driver and passenger, then stole the car.

The question in Kier was "whether Kier's second degree assault conviction merges into his first degree robbery conviction, where the carjacking incident giving rise to both charges involved two victims, and where the prosecutor in closing

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[10] Clerk's Papers at 43.

[11] Berg, 147 Wn. App. at 936.

[12] Id. at 935–36 ("[O]ur courts have recognized that the jury should not have to obtain its instruction on the law from arguments of counsel. Rather, it is the judge's province alone to instruct the jury on relevant legal standards.") (internal quotations and citations omitted).

[13] 164 Wn.2d 798, 802–03, 194 P.3d 212 (2008).

argument identified the driver as the victim of the robbery and the passenger as the victim of the assault."[14] The court concluded the convictions merged "in light of the way this case was charged and presented to the jury."[15]

In Kier, we rejected the contention that the State ensured the jury could not treat the passenger as the victim of both the robbery and the assault when, in closing argument, it clearly identified separate victims and acts for each count. "The problem with this argument is that we cannot consider the closing argument in isolation."[16] The evidence demonstrated that the passenger was a victim of the assault and the robbery; the instructions did not specify that only the driver was to be considered a victim of the robbery; and the jury was "properly instructed to base its verdict on the evidence and instructions and not on the arguments of counsel."[17] Accordingly, the Kier court concluded no clear election had been made, the verdict was therefore ambiguous, and the rule of lenity required merger of the convictions.[18]

As in Kier, during closing argument the prosecutor, for the first and only time, clearly identified the victim and the drug delivered for each charged count. As in Kier, this was not sufficient, because neither the evidence nor the instructions required the jury to accept the case as the State argued.

Because the absence of a "separate and distinct act" instruction potentially

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[14] Id. at 805.

[15] Id.

[16] Id. at 813.

[17] Id.

[18] Id.

exposed Barnes to multiple punishments for a single offense, the remedy is remand for vacation of three of Barnes' VUCSA convictions.[19] Because all convictions may have been based on a single act of delivering marijuana, the rule of lenity requires that the sole remaining conviction must be for delivering marijuana, which carries a lesser maximum sentence.[20]

Sufficiency of the Evidence

In his statement of additional grounds for review, Barnes contends there was insufficient evidence to convict him of delivery of controlled substances.[21]

Barnes points out the State presented no physical or forensic evidence of delivery, and he argues the minors' testimony was hearsay. Barnes also quotes Washington Practice for the proposition that "[p]assing control, however, such as momentarily handling the drugs, is not sufficient to establish possession."[22] Therefore, he argues, evidence that he "pass[ed] a joint" to the minors is insufficient to prove he possessed the drugs.[23]

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[19] Berg, 147 Wn. App. at 935; Borsheim, 140 Wn. App. at 371.

[20] See Kier, 164 Wn.2d at 814 (rule of lenity requires interpretation in defendant's favor of ambiguous jury verdicts involving double jeopardy violations); State v. DeRyke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002).

[21] Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences are drawn in favor of the State and most strongly against the defendant. Id. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from therefrom. Id.

[22] 13A Seth A. Fine & Douglas J. Ende, Washington Practice: Criminal Law § 906, at 174 (1998).

[23] Statement of Additional Grounds at 3.

Barnes' claims are without merit. The girls' testimony was not hearsay. Each described being provided drugs by Barnes. The issue was not possession, let alone constructive possession, and the evidence was not limited to "passing the joint" to the girls. Rather, the testimony was that Barnes bought the drugs, prepared the joints, and shared them with the girls. The evidence was sufficient.

Because Barnes suffered a double jeopardy violation, we reverse and remand with instructions for the trial court to vacate Barnes' two convictions for delivery of cocaine and one of his convictions for delivery of marijuana.

Ellington, J.

WE CONCUR:

Leach, J.

Grosse, J.